SUPREME COURT, U. S.

No. 468

AUG 19 1970

E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1970

PHYLLIS S. DREYFUS and DIANE E. DREYFUS, Petitioners,

vs.

THE FIRST NATIONAL BANK OF CHICAGO, as Trustee of the Philip S. Dreyfus Trust created under the Will of Moise Dreyfus, Deceased, of August 1, 1935 and known as Trust No. 33705; THE FIRST NATIONAL BANK OF CHICAGO, as Trustee of the Philip S. Dreyfus Trust dated August 5, 1935 and known as Trust No. 33703; and THE FIRST NATIONAL BANK OF CHICAGO, as Trustee of the Carolyn S. Dreyfus Trust, dated December 29, 1937, and known as Trust No. 33704; and MICHAEL REESE HOSPITAL AND MEDICAL CENTER, a Not-for-Profit Corporation, Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

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McCORMICK & HENDERSON, CHICAGO

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BRIEF FOR RESPONDENTS IN OPPOSITION

The Petition for Certiorari should be denied. This action, a purported will construction proceeding, was initiated by Petitioners for the clear purpose of setting aside the will of their father which appoints various trusts, over which he possessed a testamentary power of appointment, to Michael Reese Hospital, (hereinafter "Michael Reese"), rather than to his estranged daughters, the Petitioners. No substantial issues are presented and the decisions below are manifestly correct.

QUESTIONS PRESENTED

1. Where an alleged constitutional issue was neither raised nor passed upon by the courts below, will the Supreme Court accept the issue for review?

2. Does the carrying out of a testator's intention to benefit a charity, rather than his heirs, raise a constitutional issue?

STATEMENT OF THE CASE

Philip Dreyfus died in 1961 possessed of testamentary powers of appointment over the three trusts here in issue. In his will he provided $1000 bequests for each of his daughters, and left the residue of his estate, including all property over which he might have a power of appointment, to Michael Reese.

The effectiveness of Philip Dreyfus' exercise of his testamentary power of appointment over a testamentary trust created by his father Moise Dreyfus was determined adversely to Petitioners in proceedings in the Illinois Courts, *Rosenthal* v. *First National Bank of Chicago*, 40 Ill.2d 266, 239 N.E.2d 826 (1968).

Following the decision of the Illinois Supreme Court, Petitioners commenced the present action in the District Court for the Northern District of Illinois raising new theories and laying claim to two trusts in addition to the testamentary trust at issue in the *Rosenthal* proceeding. Petitioners' principal contention was as follows. Although Philip's will expressly stated his intention to limit his testamentary provision for Phyllis and Diane to $1,000 each, and expressly appointed to Michael Reese all properties over which he had a power of appointment, they alleged an inability of Philip's estate to pay the $1,000 legacy

to each of them,* that a "default of appointment" thereby resulted and that as takers in default of appointment they were entitled to the three trusts.

In the District Court Michael Reese filed a motion to dismiss for failure to state a claim upon which relief could be granted and upon the grounds that the prior Illinois state court litigation was *res judicata* with respect to the testamentary trust created by Philip's father.

The District Court granted the motion to dismiss and the Court of Appeals affirmed, holding that, under the Illinois law (Philip Dreyfus died a domiciliary of Illinois), a testator has the right to appoint to whomsoever he desires and that it would be contrary to Philip's manifest intent to construe his exercise of the power of appointment to be conditional upon payment of the $1,000 legacies to Petitioners.

While in the complaint Phyllis and Diane asserted that their rights to equal protection of the law would somehow be infringed if a California statutory provision limiting gifts to charities were not applied to prevent this Illinois testator's bequest to a charity from being carried out, the issue was expressly abandoned before the Court of Appeals and is not the purported constitutional question which forms the basis for the Petition for Certiorari.

The claim that it is "unconscionable", and therefore unconstitutional, for a testator to prefer a charity rather than his heirs was not raised in either the District Court or the Court of Appeals.

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* The full amount of the bequests to Petitioners have been tendered to them but such tender has been refused.

ARGUMENT

I. The Procedural Issues Petitioners Seek to Raise are Without Merit.

As their first reason for granting the writ Petitioners state that it was procedural error for the District Court to have dismissed the complaint prior to trial. This procedural claim has no merit.

A will must be allowed to speak for itself and there was no ambiguity whatever in Philip's will insofar as Petitioners were concerned. There were no disputed factual issues as to which a trial was required. From the four corners of the will (and this is explicitly recognized in the several grounds urged for granting the writ which belabor Philip's "unconscionable" act in appointing the trusts to Michael Reese rather than to them) it was clear that Petitioners' "construction" of Philip's will was not colorable and was in fact directly contrary to the terms of the will. No factual issues have been suggested or alleged at any stage of this proceeding which would call this conclusion into question.

II. Petitioners, Having Failed to Present Their Purported Constitutional Question to the Courts Below, May Not Assert it in This Court.

Even assuming that Petitioners' claim that judicial sanction of a testator's intention to favor a charity, rather than his children, raises a constitutional issue of equal protection of the laws under the Fourteenth Amendment (which it most clearly does not) the question is not properly raised in this Court. Petitioners did not present that issue to the courts below and under this Court's well settled rulings,

may not present it, for the first time, for consideration by this Court. *Neely* v. *Eby Construction Co.*, 386 U.S. 317, 330 (1967); *Lawn* v. *United States*, 355 U.S. 339, 362 n. 16 (1958); *California* v. *Taylor*, 353 U.S. 553, 557 n. 2 (1957).

III. Giving Effect to a Testator's Intention to Favor a Charity Rather than his Heirs Raises No Constitutional Question and Does Not Merit Review by the Supreme Court.

Petitioners' basic premise is that federal courts, on constitutional grounds, should not enforce "unconscionable provisions" in wills. While Petitioners expound upon so-called "unconscionable acts" throughout their Petition, it is not until the next to last page (Petn., p. 8) that they finally describe the act itself which supposedly violates their rights to equal protection of the laws. The so-called "unconscionable act" is merely a testator's exercise of a power of appointment in favor of a charity instead of in favor of his two estranged daughters. Since the desire to dispose of one's property to a charity is in no way unconscionable, (in fact has been usually considered laudatory), Petitioners' entire premise, upon which their constitutional theory is constructed, is faulty.

While couching their theory in constitutional terms, Petitioners' real desire is to ask this Court, in the guise of will construction, to reject on vague grounds of "unfairness" the clear directives of the testator.

In point of fact, Petitioners are asking this Court to overturn a fundamental principle of the Common Law, incorporated into the Illinois law of testamentary disposition, and in its place to create a federal constitutional law of probate which would hold that, under the Fourteenth Amendment, a person may not give his property to a charity—but must give it to his heirs. There exists no author-

ity or principle of public policy to support such a position. Its lack of merit is reflected in Petitioners' failure to raise it at any stage of the proceedings below.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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BURTON E. GLAZOV
Attorneys for The First National Bank of Chicago, as Trustee of the Philip S. Dreyfus Trust, created under the Will of Moise Dreyfus, Deceased of August 1, 1935, and known as Trust No. 33705; The First National Bank of Chicago, as Trustee of the Philip S. Dreyfus Trust dated August 5, 1935 and known as Trust No. 33703; and The First National Bank of Chicago, as Trustee of the Carolyn S. Dreyfus Trust, dated December 29, 1937, and known as Trust No. 33704; and Michael Reese Hospital and Medical Center, a Not-for-Profit Corporation, *Respondents.*

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Respondents.

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

There are statements made outside the record and contrary to the record which impel this short reply.

1. Under argument at Part II of the Brief in Opposition, the respondents assert that the constitutional question was not raised in the courts below. Respondents are in pos-

session of the records in the court below, are familiar with that record, and have wrongfully attempted to disqualify petitioners' right of appeal to this Honorable Court. The Court's attention is respectfully directed to the Appendix of the United States Court of Appeals (a certified copy of which is filed concurrently herewith). Therein, the constitutional issue of due process and equal protection of the law is set forth not only in the original complaint at page 6C, pages 17, 18 and 20 but in

Response of Plaintiffs to Motion to Dismiss And Stay Proceedings (Appendix, page 67):

"D. Where due process or equal protection of the law are in issue, res judicata is not applicable."

Affidavit of Phyllis S. Dreyfus (Appendix, page 70):

"That the plaintiffs as the only children of Philip Dreyfus would be denied the equal protection and due process of law guaranteed to them by the Fourteenth Amendment of the Constitution of the United States and against public policy if a power of appointment is recognized which allows the Dreyfus trusts established for the benefit of Philip and his descendants to be completely exhausted to charity."

In the United States Court of Appeals briefs, petitioners cited on the constitutional question *Shelby v. Kraemer*, 334 U.S. 1, 20, 22; *Jones v. Mayer* (U. S. Supreme Court) 20 L.Ed.2d 1189; and *Truax v. Raich*, 239 U.S. 33.

2. Under Argument III, page 5, respondents refer to petitioners as "estranged" and set forth the following conclusion:

> "Since the desire to dispose of one's property to a charity is in no way unconscionable (in fact has been usually considered laudatory) petitioners' entire premise, upon which their constitutional theory is constructed, is faulty."

The attempt to benefit a charity to the detriment of minor children cannot be considered "laudatory" but should be condemned as "unconscionable" by this Court. At the date of the will of Philip Dreyfus, Diane Dreyfus was 12 years of age and Phyllis Dreyfus was 15 years of age. At the time of his death both were minors under Illinois and California law (14 years and 17 years respectively). To say that these children were "estranged" is vindictive and wrong.

3. Under the stated terms of Philip's will, and as his only heirs-at-law, petitioners are in a priority position to that of the stranger-hospital as residuary legatee. It is inconceivable, at law, that the hospital was able to replace the Executor, without court appointment, and, without court order, obtain distribution of all of the assets of Philip Dreyfus valued at $2,500,000 prior to the settlement of the probate proceedings.

Deprived of due process and protection of the law, the testator's daughters have been forced to look to an adverse legatee, not only for payment (in its discretion) of their legacies and claims but as to their rights of inheritance.

The Bank, as Trustee and Executor, had a duty to carry out the provisions of Philip Dreyfus' will (Appendix A[1], page 3) in the order designated. By failing to do so, the Bank as Trustee and Executor stands in breach of its fiduciary capacity and the hospital stands in unlawful possession of the assets of the estate and trusts of Philip Dreyfus.

CONCLUSION

Petitioners are properly before this Court. As minors and wards of the Probate Court of the State of California, they were entitled to extraordinary consideration by the courts of Illinois. The record is clear that they have been denied their rights of due process and equal protection under the law guaranteed to them by the United States Constitution.

Respectfully submitted,

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1 Appendix A to Petition for Writ of Certiorari.